IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

SITTING AT TARIME

CRIMINAL SESSIONS CASE NO. 30 OF 2017

THE REPUBLIC

VERSUS

1. MURUGA S/O ISARO @ NG'WAINA

2. MARWA S/O MAKURI @ MAKURI

JUDGMENT

04th & 16th June, 2020

TIGANGA, J

In this case, the two accused persons namely Muruga Isaro @ Ng'waina and Marwa Makuri @ Makuri, hereinafter referred to as the 1st and 2nd accused persons respectively, stand charged with one offence of Murder contrary to section 196 and 197 of the Penal Code (Cap 16 RE 2002) as revised in 2019 to be [Revised Edition of 2019].

The particulars of the offence which they are charged with are that, on 19th day of September 2015 at Nyabitocho Village in Tarime District, Mara Region, the accused persons murdered one Mwita Muchari.

Upon arraignment, both accused persons pleaded not guilty to the information, and during preliminary hearing, they admitted to their names and personal particulars as they appear in the information and the facts. They also admitted to the date of arrest and the facts that they were charged in this case.

Following that plea to the information and their response to the facts during preliminary hearing, the prosecution had to call witnesses to prove the case. In such endeavor, they called four witnesses namely Muchari Mwita, Nyaruhucha Keraryo Nyaruhucha, Benardino Buyanza and G. 9298 D/C John who had their evidence recorded as PW1, PW2, PW3 and PW4 respectively.

Out of four witnesses, PW1 is said to have witnessed the incident, while PW2 is said to be among the first people to respond to the alarm and conducted search of the assailants immediately after the incidents. The rest two are experts, PW3 being Assistant Medical Officer who examined the body of the deceased, while PW4 is the Police officer who investigated the case and recorded the statements of some of the witnesses including Ester Mwita Muchari who was not found to appear and testify.

PW3 tendered postmortem examination report, as exhibit PE1, while PW4 tendered the sketch map as exhibit PE2 and under section 34B of the Evidence Act [Cap 6 RE 2019] he tendered the statement recorded by one witness, Esther Mwita Muchari who unfortunately was not found to appear and testify. That statement was admitted as exhibit PE3.

The Republic was represented by a team of two Attorneys namely, Nimrodi Byamungu and occasionally, Peter Ilore – learned State Attorneys, while the accused persons were represented by Miss. Rebecca Magige and Mr. Onyango Otieno, learned counsel for 1st and 2nd accused persons respectively.

It is important also to point out that, this case proceeded under the assistance of the distinguished one lady and two gentlemen assessors whose names are as reflected in the proceedings.

A summary of evidence by the prosecution is that, on 19/09/2015 at 23.00hrs, PW1, a peasant and petty businessman who was living and working for gain his activities in Nyabitocho village in Tarime District, Mara Region, was asleep together with his wife Bhoke Muchari. While there, the door of his house and room was forcibly broken by using a stone commonly known as "Fatuma", soon after breaking the door, three persons entered inside the house and in his room, one carried a fire arm, other two had traditional weapons including bush knife commonly known as panga, clubs and iron bars.

According to PW1, the solar rechargeable lamp which was hanged on the wall in the room was on, with enough bright light to provide light in the whole room. That assisted him to identify the assailants. It is his evidence that using that light, he managed to identify them all. He mentioned them starting with Lucas Solai Nyang'ombe, who is not in court, Muruga Isaro Ng'waina, the 1st accused person and Marwa Makuri Makuri the 2nd Accused person.

It is his further evidence that, the factors which assisted him to identify the assailants are that, they were all familiar to him. Describing their familiarity he said, Lucas Solai Nyang'ombe was a regular customer who was buying various items including petrol from the PW1's kiosk, the first accused being a friend of the second accused, but who was a regular visitor of the kiosk of PW1 in the company of the second accused person, the latter being his brother in law. The second factor which assisted him to identify them, was the size of the room in which they were, he said that the room was 4x4 meters, while the third factor being the intensity of the light from the solar rechargeable light hanged on the wall.

The evidence is further to the effect that, the assailants forced PW1 to give money, in the course, the 2nd accused person attacked PW1 using a panga on his leg and head. Responding to that demand, PW1 gave them Tshs. 165,000/=, (one hundred and sixty five thousands). That was before he was taken to his kiosk where he also gave them Tshs. 700,000/= (seven hundred thousands), and wherefrom, they took airtime vouchers valued Tshs. 200,000/= (two hundred thousands) and some other coin money whose value was not immediately ascertained.

Soon after taking such items, they locked him in the kiosk and left, before he heard the door of his son's room Mwita Muchari, the deceased, banged into, and he heard a fire discharge explosion, followed by an alarm from her daughter in law, Ester Mwita Muchari. That explosion made him struggle to open the door of the kiosk, which he opened and went out of the shop only to find his son Mwita Muchari laying down helpless, bleeding with his intestine out.

The alarm was raised, as a result, people gathered including PW2 Nyaruhucha Keraryo Nyaruhucha, the then Nyabitocho village government chairman who, when he reached there, he found the deceased serious injured as well as PW1. It is PW2's evidence that, when he asked the deceased what happened, the deceased told him that, he was shot by the person he recognized to be Lucas Solai Nyang'ombe, who was in the company of Marwa Makuri Makuri, and another third person he did not identify, while PW1 told him that, he was also injured on the leg and on head by Marwa Makuri Makuri the second accused person, who did beat him using a panga.

Few people from the group of those who responded to the alarm, assisted to take the deceased and PW1 to hospital, while most of the people joined and started to follow the trail of footprints, (commonly known as "kufuata nyayo"). It is PW2's evidence which have never been controverted that, he went in the company of many other people, some of them being Mussa Astariko, Mucharia Muhere and Masero Muchari. The footsteps, led them to a nearby country of Kenya in a village called Masangura. That village was the home village of Lucas Solai Nyang'ombe, who was identified by PW1 at the scene.

According to PW2 who was the leader of the group, before they reached at the home of the said Lucas Solai Nyang'ombe, where they were led by the footsteps, they found and picked the cover of the radio make rising, which was also stolen from PW1 kiosk. They went to the house of the said Lucas Solai Nyang'ombe, surrounded his compound, before contacting the police officers of Masangula police station in Kenya who conducted

search in that house, and found the radio make rising which was suspected to have been stolen from PW1's kiosk. Following such search and recovery, they arrested Lucas Solai Nyang'ombe who by the assistance of police officers of Masangura police station was taken to Nyabitocho village office, before he was handed over to police officers from Sirari Police station.

According to him, among the people mentioned by PW1 and the deceased, he personally knew, Marwa Makuri Makuri, who was the villager of Nyabitocho village, a village that he has been its chairman since 2009 to 2019, for ten years, he knew him since he was born in that village. It was PW2's evidence that, Marwa Makuri Makuri, the second accused person was neither one of the people who went to Kenya in following the trail of footprints nor was he seen at the burial of the deceased.

On further examination, PW2 said that, he decided to lead his people to find Lucas Solai Nyang'ombe because they heard, he was the one holding the gun. To the home of Marwa Makuri Makuri, he went after they came from Kenya, but did not find him, however PW2 was informed later that the second accused person was arrested in Kenya.

Regarding the deceased, the evidence is to the effect that he was taken to Sirari hospital, then referred to Musoma Regional referral hospital where he was admitted, while PW1 remained at Sirari where he was admitted for two days. It was on 20/09/2015 when the deceased died. His body was examined on 21/09/2015, at about 12.00hrs by PW3 Benardino Buyanza, an Assistant Medical Officer who was by then working at Musoma Regional Hospital. He conducted such examination after the body of the

deceased has been identified to him by the relative of the deceased and the police officer from Tarime.

After such examination, he prepared a report in which it was concluded that, the death of Mwita Muchari was not natural, it was caused by the injury which was caused by a gunshot, which was called severe infection secondary to gunshot. That was before the body of the deceased was taken to his home village and buried on 22/09/2015, at PW1's home. The report on Post - Mortem Examination Legal of Mwita Munchari was tendered and admitted exhibit PE1.

PW1 further said that, there were other robbers who remained out, he saw them when he was taken out from his room to the kiosk. He managed to see them because there was a bright moonlight, they were standing outside, guarding other people from coming to the compound, one carried a fire arm and the other one had traditional weapons like clubs and pangas. However he did not recognize them by names and faces.

Describing the intensity of the light from the moon, he said it was brighter to the extent of giving view to the distance of 100 meters that is from the start of the football pitch to the end. PW1 further said that when Nyaruhucha Keraryo, PW2 and other people responded to the alarm, he told them that it was Lucas Solai, Marwa Makuri and Muruga who invaded him.

After the matter was reported to police soon after the incident, the police arrived at 01.00Am on that very night, but after the date had changed to be 20/09/2015. Upon arrival, PW4 a police officer with force No. G 9298 D/C John, on conducting surveillance to the scene of crime, recovered and

collected one discharged bullet which was in the room of Mwita Muchari the deceased. He also recorded the statement of the wife of the deceased Ester Mwita Muchari. That was before he was assigned that case on 21/09/2015 to investigate, the assignment which necessitated him to go back to the scene, where he drew the sketch map of the scene of crime by the assistance of the father of the deceased, PW1, and recorded the statement of the witnesses. He tendered the sketch map as exhibit PE.2.

He said few days before this session, he was directed to summon the witnesses including Esther Mwita Muchari but he did not get her. He was informed by people in the family of the deceased that, after the death and burial of the deceased, she went back to Kenya which was her home place. In effort to search for Esther Mwita Muchari, PW4 went to Kenya in Masangura village which is about 20km from Sirari, that effort however, did not yield any fruit. He therefore tendered the said statement of Ester Mwita Muchari under section 34B of the Evidence Act, [Cap 6 RE 2019]. It was admitted as exhibit as exhibit PE3.

That marked the prosecution case, and upon passing through the evidence and the law upon which the accused persons stand charged, it was ruled that the prosecution had managed to establish a prima facie case for the accused persons to answer. The accused persons were addressed in terms of section 293(1) of the CPA [Cap 20 R.E 2019] over their right of defence. Following such address, the accused persons opted to defend themselves on oath and decided not to call any other witness other than themselves.

Their defence had the following facts in common, they both disputed to be at the scene of crime on the fateful date, at the time when the offence was committed, and they also disputed to have committed the offence. While first accused person testified as DW1, the second accused testified as DW2. Generally their versions of story are completely different from that of the prosecution.

The first accused said that on 19/09/2015 he was at his home in Kubiterere village, in Mwema Ward in Tarime District, doing his peasantry job, he left his home at 06.00hrs and went to shamba which is near his home, he returned at 10.00hrs, took bath, and ate his lunch. That was before he went to Kubiterere shopping center, where he stayed up to 13.00hrs, when he returned at home he did not go out at again. He disputed to go to Muchari on 19/09/2015, because he did not even know the said Muchari or his said son that is the deceased.

He said he was arrested on 23/09/2015 at Sirari by two police officers who had the motorcycle. On his arrest, he was not told the reasons of his arrest. The police who arrested him, told him that they were sent by OC - CID. They took him to the OC - CID and introduced him, before the OC CID had ordered them to take him to lockup. It is his evidence that, in the lockup, he found other accused whom later knew their names to be Lucas Solai and Marwa Makuri, but he did not know them before.

Later at 20.00hrs of that day, they took him to Tarime police station, where upon arrival, he was asked by two police officers who did not testify here in court, to tell them what he knows on the robbery incident which was

committed in Nyabitocho village. His answer that he knew nothing, irritated them, they threatened to kill him. According to him, as a result, one police officer stabbed him by using a knife which was affixed to the firearm.

Following that state of affairs, even on 24/09/2015 when he was taken out in the morning to be interrogated, he refused to be interrogated on the ground that he was feeling pain and that he would speak in court, consequent of which he was brought to court and charged with murder, together with other two accused persons. Generally in his defence, he did not only dispute to commit the offence, but also to know the second accused person and the village he was coming from as they have never been friends. He knew him when they were charged together.

On cross examination, he said he is a resident of Kubiterere village where he was living with his mother Ghati Mwita and his wife Christina. He said when he refused to be interrogated, they had already recorded his names. He said he had never heard the name Nyabitocho, and does not know whether Nyabitocho is a village, therefore he never visited or gone to Nyabitocho village and did not know PW1 and PW2. He said he could not call his relative or wife to give evidence in his favour because, PW1 failed to mention where he was living and his second name.

The second accused testified as DW2, he resides in Nyabitocho village since when he was born, doing his peasantry job. He admitted to know the deceased as his fellow villager who was living at a distance of about 800 meters from his home. His defence was that on 19/09/2015 at 23.00hrs, he was asleep at his home with his wife. He heard the alarm, woke up, and

went straight to where the alarm was coming from. When he reached at PW1's home, he found the deceased laying down injured. There was also other people, some asked the deceased whether he knew any of the persons who committed the offence against him, but the deceased said he did not.

Following the condition of the deceased, some Good Samaritan took him to hospital. According to him, since it was at night, there was a suggestion that they go to sleep and in the next morning they would follow a trail of footprints.

He said he was among the people led by PW2 who went to Kenya in the following morning. They followed the foot prints which led them to the house of Lucas Solai Nyang'ombe. He said on their way to Lucas Solai Nyang'ombe they picked the cover of the radio make rising which was suspected to be of the radio which was alleged to be stolen from the home of PW1. At the house of Lucas Solai Nyang'ombe, they found his wife and his children. He said, he was there when they conducted search in the house of Lucas Solai Nyang'ombe and found the radio inside the house. Thereafter they came back to Tanzania at about 10.00 hrs and all that time he was there but was never arrested.

In his defence, he complained that PW2 did not speak the truth when he said the second accused person was not there, he disputed to commit the offence he is charged with. He went as far as telling the court that he even participated in the burial of the deceased. He said it was after the burial of the deceased when he went to his sister in Kenya where he was arrested

from. He said, he did not participate in the killing of the deceased, this case has therefore been framed up against him.

On cross examination, he said that he had no enmity with the family of Muchari, as his brother married in the clan of Muchari. He also said, he did not know the first accused person. Further to that, he said he was very near from where the deceased was lying, when he responded to the alarm. The deceased was able and was speaking. He said some of the people who responded to the alarm were, Marwa Musabi, and Stariko Gimonge, he said he participated in the burial ceremony of the deceased on 21/09/2015.

The closure of both the prosecution and defence cases was followed by the final closing submissions from the counsel for both sides. For the purpose of brevity, I will not reproduce what the counsel for both sides submitted, but I will extensively consider them in my judgment.

Further to that, after receiving final closing submissions, I summed up to the Lady and Gentlemen assessors, and received their opinions. The first assessor's opinion was that, the prosecution have proved the case beyond reasonable doubt. The accused deserves to be convicted for murder. That was also the opinion of the second assessor. While the third assessor opined that the chain of circumstantial evidence against the accused was broken, therefore the prosecution have failed to prove the case beyond reasonable doubt, therefore his opinion was that the accused persons are not guilty of the offence they are charged with. I will also consider them along with the reasons I will give in this judgment.

That being a comprehensive summary of the proceedings, it is important to once again restate that the accused persons are charged with the murder of Mwita Muchari contrary to section 196 and 197 of the Penal Code (supra), in the case of murder these provisions must be read together with section 200 of the same law. While section 196 provides that a person commits an offence of murder if with malice aforethought, he causes death of another person by unlawful act or omission. The term Malice aforethought, has been defined by section 200 of the Penal Code (supra) to mean, any evidence proving any one or more of the following circumstances–

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

This has been interpreted in the case of **Bomboo Amma and Petro Juma @ Lanta vs The Republic**, Criminal Appeal No. 320 of 2016 CAT Arusha (Unreported).

Gathering from the summary of the proceeding in this case the relevant parts are paragraphs (a) and (b) of section 200 cited above learning from there, the prosecution needs to prove the following ingredients of the offence.

(i) That the said Mwita Muchari died, and that the death was not natural,

(ii) That the death was caused by the accused persons in this case,

(iii) That the accused person actually intended to cause such a death, or had knowledge that the act or omission causing death will probably cause the death,

In this case, by the evidence of PW1, PW2, and PW3 as well as the exhibits PE1 and PE3 which is the statement of Ester Mwita Muchari, prove without doubt that Mwita Muchari died and his death was unnatural as it has been proved that he died of a gunshot which caused severe internal organ injuries which affected the colon and small intestine.

The question remains who caused such a death. While the prosecution alleges through the evidence of PW1, PW2, PW3 and PW4 as well as exhibits PE1, PE2 and PE3 that it was the accused persons who caused a death of the deceased, the defence disputes to have caused such death of the deceased. The Republic capitalizes on the evidence of three types; **one,** the

identification of the accused persons at the time when the offence was committed, **two**, circumstances surrounding the commission of the offence, **three**, the evidence on common intention, and **four and last** the credibility of the prosecution witnesses. While the defence mainly relied on the defence of alibi, and that the evidence was more circumstantial than direct.

The offence was committed at night, therefore the principle applicable, as rightly submitted by Mr. Onyango Otieno learned counsel, in his final closing submissions, are those established in the case of **Waziri Amani vs Republic,** [1980] T.L.R 250 In that case, the court of appeal held inter alia that;

> *"The evidence of visual identification is of the weakest kind and no court should act on it unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight. Before relying on such evidence, the trial court should put into consideration the time the witness had the accused under observation, the distance at which the witness had the accused under observation, if there is any light, then the source of light and intensity of light and whether the witness knew the accused person before"*

Also see **Gozibert Henerico Vs Republic,** Crim. Appeal No. 114 of 2015. To be precise, the prosecution needs to bring evidence stating the following factors before the court has relied upon the evidence of identification;

(i) *The time the witness had the accused under observation*

(ii) *The distance at which he observed him,*

(iii) *The condition in which such observation occurred, for instances whether it was day or night (whether it was dark, if so was there moon light or hurricane lamp etc) (the source and intensity of light),*

(iv) *Whether the witness knew or had seen the Accused person before or not.*

Relying on the evidence of identification at night, the Republic is supposed to make sure that the above factors have been stated for the court to rely on the evidence of visual identification.

In this case, the prosecution witnesses gave evidence about the time the witness had the accused persons under observation. PW1 for instance said the accused persons spent more than 15 minutes inside the room demanding the money from PW1 that was before taking him to the kiosk where they also spent a considerable time forcing him to give them more money, a result of which he gave them Tshs 700,000/=. Together with that amount they took vouchers valued Tshs. 200,000/= as well as coin money which had its value not ascertained. Although the time spent in the kiosk has not been stated in the evidence, however, given the activities done in the kiosk, the time spent cannot be a blink of eyes. It must be a time enough to do what was done in the kiosk.

Further to that, the prosecution evidence also stated the distance at which the witness PW1 and the author of exhibit PE3 had the accused under observation. PW1 said was in small room of the size of 4x4 meters, which

means it was 16 square meters. Also the exhibit PE3 Ester Mwita Muchari stated that, the room in which the deceased was shot was a normal room and that he observed the accused at five meters.

Furthermore, the prosecution witnesses mentioned the source of light to be a rechargeable solar lamp hanged on the wall, while at the same time mentioning the intensity of light that it was bright enough to make them identify the accused persons.

Last they also stated that, they knew the accused persons before. While the second accused person was known because is a brother in law to PW1, the first accused person was a friend of the second accused person and therefore the regular visitor and customers of goods in the kiosk owned by PW1. That according to them, assisted the identification of the assailant.

To the contrary, the accused persons disputed to be at the scene of crime and to be identified as alleged.

Now looking at the evidence of both sides, it is clear that on this issue this matter is bound to fail or succeed on the bases of the credibility of the witnesses. It means unless one believes what was said by the prosecution witnesses, can found the conviction basing on their evidence.

It is a principle in law that, only a credible and reliable witness can be believed, for their evidence to form base of the conviction in criminal cases. See; **Shija Juma Vs Republic,** Criminal Appeal No. 383 of 2015. CAT (Bukoba) (Unreporrted).

That being the case, the issues is, what affect the credibility and reliability of the witness in law? In my considered view, a number of factors

may affect the credibility and reliability of witnesses, few of them being the following;

(i) Contradictions, discrepancies and the conflicting statement in the witnesses evidence,

(ii) Failure of the witness to mention the suspect at the earliest opportunity possible,

(iii) To give evidence basing on suspicion,

(iv) Evidence based on hearsay,

(v) Witness testifying as accomplice and

(vi) A witness with interest to serve.

Without the short coming caused by these factors and others certainly not mentioned here, a witness deserves to be believed, if he is competent to testify.

It is also a principle that a trial judge is better placed to assess the credibility of the witness as he is in the position to grasp the inconsistencies, to assess the demeanors and the flow of the evidence. See **Goodluck Kyando Vs The Republic,** Criminal Appeal No.118 of 2003 CAT- Mbeya (Unreported)

In this case, just like many cases, contradiction of the evidence of some of the witnesses have been pin pointed. Some are apparent while others are perceived. Some apparent contradictions as rightly submitted by Miss Rebeca Magige Learned Counsel for the first accused person is that, PW2 is not reliable at all as at first in the examination in chief, he said he did not know the 1st accused, but on cross examination he said he had once

seen him, that according to Miss. Magige, makes a witness unworthy of credit.

It is a principle of law as submitted by Mr. Byamungu learned State Attorney while citing the authority in the case of **Chrisant John vs Republic**, (supra) court held *inter alia,* that;

> *"We wish to state the general view that, contradiction by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions it must. It must always be remembered that witnesses do not make a blow by blow mental recording of the incidents. As such contradictions should not be evaluated without placing them in their proper context in an endeavour to determine their gravity, meaning, whether or not they go to the root of the matter or rather corrode the credibility of a party's case.*

Citing the case of **Dickson Elias Nsamba Shapwata & another v. Republic**, Criminal Appeal No.92 of 2007, the Court of Appeal further held that;

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter"*

The central issue in dispute in this case is who killed the deceased. PW2's evidence was actually reporting what he was told after he arrived at the scene, he was not at the scene when the offence was committed, this means the issue whether he knew or he did not know the first accused, does not affect the evidence as he was not the identifying witness. That being the case the contradiction in his evidence does not go to the root of the matter.

The other cited contradiction incident in this case is regarding the place where the deceased was shot, while the Medical Doctor PW3 says it was in from the right side to the left sides of the belly, PW1 said, he was shot from the back. Evaluating these kind of evidence, it is easy to find that this kind of contradiction does not eliminate the fact that the deceased was shot dead and that his death was unnatural. It should also be taken into account that the deceased was shot in the presence of Esther not PW1. Further to that, at the time when the deceased was injured PW1 was as well injured, they were both assisted and taken to hospital. However Esther who was present has her statement similar to the findings of the PW3 when she said that, "mume wangu alipowajibu kuwa yeye hana hela, baada ya kuwaeleza hivyo kuwa hana hela Lucas Solai Nyang'ombe aliamua kumpiga risasi sehemu ya tumboni..." That makes the contradictions to be just minor, which do not go to the root of the case, they are therefore ignored.

Regarding the second issue as to whether the witnesses mentioned the accused persons at the earliest opportunity possible. This is built on the principle enunciated in the case of **Jaribu Abdallah vs Republic**, Criminal Appeal No. 220 of 1994 (unreported) in which it was held that;

"..delay in naming a suspect at the earliest opportunity dents a witness's credibility especially where the identification of the suspect is in issue."

Further to that, in the case of **Marwa Wangiti Mwita & another vs. Republic,** [2002] TLR 39 in which it was held inter alia that;

"The ability of a witness to name a suspect at the earliest opportunity possible is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry (emphasis supplied)".

In this case, PW1 and Ester Mwita Muchari immediately after the incident, mentioned the names of the accused persons to those who responded to the alarm including PW2 who upon such a mention, mounted a trail of footprints to Masangura Village to Lucas Solai Nyang'ombe. The evidence show that Ester mentioned them to PW4 when he was recording exhibit PE3. For that reasons, the witness in this case mentioned the suspect at the earliest opportunity possible the fact which make them more reliable that they identified the accused person.

Their evidence are neither based on suspicion, nor hearsay. PW1, PW2 and Ester Mwita Muchari evidence are not accomplice and they have no interest to save as there is no any evidence to show that they had any enmity with the current accused before the incident.

These witnesses are therefore worthy of credit, their evidence should be believed and relied upon, as their evidence is direct in as far as the particular aspect is concerned.

Miss Rebecca Magige learned counsel for the first accused person, submitted in her final closing submissions that as the evidence against the accused person in this case is circumstantial, the same must comply with the requirement established in the case of **Ndalahwa Shilaga, Buswelu Busahi Vs Republic** Criminal Appeal No. 247 of 2008 CAT Mwanza, under which three principles were established three tests to be met before circumstantial evidence has been relied on to found the conviction, these principles are as follow;

(a) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.

(b) Those circumstances should be of definite tendency unerringly pointing towards the guilt of the accused person, and

(c) The circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person and no one else.

I have carefully looked into the evidence as adduced by the prosecution side, with all due respect to Miss. Rebeca Magige, I find it to be more of direct type than circumstantial, the base of my such findings is that looking at the evidence, the witnesses talk about what they witnessed except on few aspects in respect of the evidence of PW1 with regard to the issue of

who shot the deceased. However, the evidence contained in the exhibit PE3 resolve that dispute that it is Lucas Solai Nyang'ombe who shot the deceased to death.

Further to that, even the prosecution evidence has not disputed the fact that the accused person did not personally shoot the deceased, what they contend is that when the deceased was shot they were present and were together with the person who shot him. Therefore the authority in the case of **Ndalahwa Shilaga, Buswelu Busahi Vs Republic** (supra) is distinguishable in this case.

The accused persons deny to be present at the scene when the offence was being committed, each of them alleges to be at his home with his family. In essence they were raising a defence of alibi. That defence was attacked by the prosecuting state Attorney Mr. Byamungu, in that it did not follow procedure of giving notice in terms of section 194 (4) and (5) of Criminal Procedure Act [Cap 20 R.E 2019] and some other principle as contained in the case laws already cited.

As correctly submitted by Mr. Byamungu, the defence of alibi is provided under section 194 (4) of the Criminal Procedure Act (supra) which provides that;

> *"Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case".*

Under sub section (5)

"If he fail to give such a notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed".

These provisions have been interpreted in the case of **Hamis Bakari Lambani vs Republic,** Criminal Appeal No. 108 of 2012,

First, the law requires a person who Intends to rely on the defence of alibi to give notice of that intention before the hearing of the case, section 194(4) of the Criminal Procedure Act, Cap 20. If the said notice cannot be given at that early stage, the said person is under obligation, then, under subsection 5, to furnish the prosecution with the particulars of alibi at any time before the prosecutions closes its case. Should the accused person raise the alibi much later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence, section 194 (6)."

In the case of **Kibale Vs Uganda,** (1999) ERL volume I (EA) 148, cited by Mr. Byamungu, it was held inter alia that;

"A genuine alibi is expected to be revealed to the police investigating the case or to the prosecution before the trial on hearing. Only when it is so done, can the police or the prosecution have opportunity to verify the alibi. An alibi set up for the first time at the trial of the accused person is

more likely to be an afterthought other than a genuine one."

Ordinarily the principle governing the defence of alibi was designed to enhance the rule of disclosure. It intended to disclose the defence to the investigator and the prosecutor, for them to investigate the truthfulness of the defence and take appropriate action or prepare to counter it. Failure so to give notice at the appropriate stage denies the prosecution the opportunity to prepare to challenge it.

That being the intention of the law, the court has been given the discretion under section 194 (6) of the CPA (supra) after considering the defence of alibi raised without having first furnished the court and prosecution with notice and particulars of alibi respectively, pursuant to section 194, to accord no weight of any kind to the defence.

Having raised the defence of alibi, it is expected of the accused person to call a person who was with him at the place where he alleges to be when the offence was committed. Failure to do so, leaves a defence weak and un believable as held in the case of **Chrisant John Vs The Republic,** Criminal Appeal No 313/2015 CAT - Bukoba (unreported) and **Masound Amlima Vs Republic**, (1989) TLR 25.

The first accused person said he was at his home together with his wife Christina and his mother Ghati Mwita but he said he did not call them because PW1 did not mention where he was living and his second name. While the second accused who said he was at the crime scene in response to the alarm, and that he went to Kenya to search for the assailants, and came back, before participating at the burial, without being seen even by

PW2 who is the village leader, was expected to call one of the persons who was in his company to say so, however, he failed to call any person who saw him while they were following the footsteps in Kenya or who saw him at the burial of the deceased.

For that reason find that the alibi raised by the accused person was has not been proved for the reasons that, first, it was given contrary to section 194(4) and (5) of the Criminal Procedure Act, (supra). Moreover, the accused persons failed to even call witnesses to prove that they were actually with them at the time the offence was allegedly committed, Having considered all these factors and the strength of the evidence given, I find the raised defence of alibi to be weak, and thus in terms of section 194(6) of the Criminal Procedure Act [Cap 20 R.E. 2019], I will not accord it any weight.

On the apparent defence that none of the accused was mentioned to have personally killed the deceased, Mr. Byamungu invited the court to make reference to the provisions of section 23 of the Penal Code [Cap.16 R.E 2019] and find that the accused persons had common intention in committing the offence they are charged with. Despite the fact that they had no gun and did not personally shoot the deceased.

He submitted that in this case the accused persons had common intention to steal, but they had firearm and killed the deceased in the course, after he failed to give them money, the killing being the consequence, this means, they went there for both consequences.

It is true that section 23 provides for the offences committed by joint offenders in prosecution of common purpose; for easy reference it is hereby reproduced in extenso as follows;

Section 23

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

In the case **Shija Luyeko vs Republic,** [2004] T.L.R 254 it was held *inter alias* that;

> *"For common intention to be established two or more persons must form a common intention to commit an unlawful act together but when one hires another to commit an unlawful act on his behalf he does not form a common intention with that other person but procures such person to commit the offence on his behalf.*

From the provision and the case cited above for common intention to be established the following facts must be proved;

(i) *That two or more persons each formed an intention to prosecute a common purpose in conjunction with the other or others*

(ii) *That the common purpose was unlawful*

(iii) *That the parties, or some of them commenced or joined in the prosecution of the common purpose;*

(iv) *That in the course of prosecuting the common purpose, one or more of the participants committed the offence*

(v) *That the commission of the offence was the probable consequence*

Further to that, as rightly submitted by Mr. Byamungu, common intention does not require a prior agreement between the parties to it, the presence and the conduct of the offenders may suffice the same. The authority in the case of **Damiano Petril and Another Vs Republic,** [1980] T.L.R 260, speaks louder on that;

> *"The formation of a common intention does not require prior agreement, it may be inferred from the presence of the offender their actions and commissions if any"*

In this case, as aforesaid in the previous issues, the accused persons were in the company of the person who shot dead the deceased, i.e Lucas Solai Nyang'ombe. According to the evidence of PW1, they were together almost at every point. For instance, when the door of the room of PW1 was broken, they entered together, they demanded the money together. Further evidence shows that the second accused did beat PW1 in the effort to force him to give the money.

As if not enough, when they took PW1 to the kiosk they were together. Last but one, according to the evidence contained in exhibit PE3, all three

were together in the room of the deceased when the same was broken into, and they were together when the deceased was shot.

From the summary of what happened, it is not in dispute that the accused persons and Lucas Solai Nyang'ombe had formed an intention to prosecute a common purpose which is an offence of armed robbery in conjunction with one another. It is also without dispute that, the said common purpose was unlawful. That common purpose was prosecuted by all of them. In the course of prosecuting that common purpose of armed robbery, one of them i.e Lucas Solai Nyang'ombe committed the offence of murder against the deceased, which offence was the probable consequence.

It is understood when it was said that the accused did not personally shoot the deceased. Therefore they are not principal offenders. However, section 22 provides for the categories of offender, the categories ranges from the principal offender, to aider, abettor, accomplice, and so many other categories. However each of them is deemed to have taken part in committing the offence and to be guilty of the offence.

Under section 22 (1) (a), (b), (c), (d) of the Penal Code [Cap 16 RE 2019] offenders are classified. In this case the relevant paragraphs are (a) and (b), while paragraph (a) deals with actual offender who in this case is said to be Lucas Sorai Nyang'ombe, paragraph (b) provides for those supporting the principal offender, who are in this case the accused persons. Under this law, if the offence is committed both are charged and taken to have committed the same offence.

Section 110 and 112 read together with section 3(2) (a) provides for the burden and standard of proof in criminal cases. All these sections provide that the burden of proof is on the prosecution and the standard of proof is beyond reasonable doubt. These provisions have been interpreted by a number of case authorities, few of which are to be mentioned here i.e **Woodimington vs DPP** (1935) AC 462 as well as **Mwita & Others vs Republic,** [1977] L.R.T. 54.

Now, with these two principles of burden and standard of proof, I find important to add another principle found in the case of **Maliki George Ngendakumana vs Republic,** Criminal Appeal No. 353 of 2014 (CAT) Bukoba (unreported) which *inter alia* held that:-

> *"...it is the principle of law that in criminal cases, the duty of the prosecution is two folds, one to prove that the offence was committed and two that it is the accused person who committed it"*

The term beyond reasonable doubt is not statutory defined, but have been defined by case law. In the case of **Magendo Paul & Another vs Republic** [1993] T.L.R 219 (CAT), it was held *inter alia* that,

> *"...for a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily be dismissed"*

This was held in the line with the philosophy in the case of **Chandrankat Jushubhai Patel Vs Republic** Crim. App No 13 of 1998 (CAT DSM) in which it was held that;

> *"...remote possibility in favour of the accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of criminal justice if they were permitted to displace sold evidence or dislodge irresistible inferences"*

From my findings on every issue raised, and looking at the evidence in total, it goes without say that the prosecution have managed to prove the case beyond reasonable doubt. The evidence presented against the accused persons is very strong in proving their guilty.

In my evaluation of such evidence, I have not managed to locate any possibility in their favour, and if there is any of such possibilities which has escaped my attention, then the same is so remote, and is incapable to displace solid evidence as presented by the prosecution or dislodging irresistible inference against them.

That said, I agree with the two lady and gentleman assessors, and differ with the 3rd assessor for the reasons given. I consequently find both accused persons namely **Muruga s/o Isaro @ Ng'waina** and **Marwa s/o Makuri @ Makuri** guilty of murder contrary to section 196 and 197 of the Penal Code [Cap 16 RE 2019]

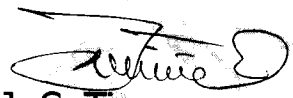
It is accordingly ordered

DATED at **MWANZA** this 16th day of June, 2020.

J.C. Tiganga

Judge

Judgment delivered in open court in the presence of the Accused persons, Mr. Byamungu –State Attorney for the Republic, Ms. Rebeca Magige – Advocate for the first accused and Mr. Onyango Otieno - Advocate for the second Accused:



J. C. Tiganga
Judge
16/06/2020

SENTENCE

I have heard the mitigating factors as presented by the Advocates for the defence, and the aggravating factors as presented by Mr. Byamungu State Attorney for the Republic. These factors would have been properly considered and taken on board, if I had powers to go against the mandatory statutory sentence provided by law. Unfortunately the offence with which the accused persons stand convicted has only one sentence which I have no mandate to go against. It provide for the sentence of death by handing. That being the position of the law, I find myself compelled to sentence them in accordance with the law and not otherwise.

For that reason, I hereby sentence the convicts **Muruga Isaro @ Ng'waina and Marwa Makuri @ Makuri,** to suffer death by hanging as provided by section 197 of the Penal Code [Cap 16 RE 2019].

It is so ordered.

J. C. Tiganga
Judge
16/06/2020

Sentence pronounced in open court in the presence of the parties as indicated above.

J. C. Tiganga
Judge
16/06/2020

The Right of Appeal to Court of Appeal is explained and guaranteed.

THE HIGH COURT OF TANZANIA
MWANZA

J. C. TIGANGA
JUDGE
16/06/2020